**IN THE SUPERIOR COURT IN AND FOR DELAWARE**

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| JOSEPH BALBACK, Individually and as Husband to JOAN BALBACK and JOAN BALBACK, Individually and as wife to JOSEPH BALBACK, et al. | : | |
| PLAINTIFFS, | : | S18C-06-034 RFS |
| V. | : | |
| MOUNTAIRE FARMS OF DELAWARE, INC., a Delaware corporation, et al., | : | |
| DEFENDANTS. | : | |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOUNTAIRE CORPORATION, MOUNTAIRE FARMS OF DELAWARE, INC. AND MOUNTAIRE FARMS INC.,**
**MOTION FOR A GAG ORDER**


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**1. Background**. This is an environmental mass tort action which has been filed due to continuous and severe acts, failures, and omissions that caused toxic waste from Defendants' Millsboro chicken slaughter facility to contaminate drinking water of the nearly 101 Plaintiffs (hereinafter the "Named Plaintiffs"). Named Plaintiffs have suffered personal injuries, property damage, and nuisance damages.

Various lawsuits have been filed due to Defendants' acts. Included among these is a proposed class action lawsuit involving two plaintiffs, the Cuppels, which this Court presides over but was filed by unrelated law firms. *Cuppels v. Mountaire Corp., et al*., Case No. S18C-06-009 RFS. In the context of that action, counsel and/or parties for both Cuppels and Defendants engaged in ***proactive*** public relations campaigns through various media including a social media live stream press conference, radio advertisements, print advertisements, and other means. The Cuppels then filed a request that the Defendants be gagged. In response, the Court issued a limited gag order against both parties, including the ***two*** named plaintiffs, and their counsel.

In support of their motion, Defendants identify an interview taken by members of the press, specifically "Rebel HQ" working with "The Young Turks"—two affiliated national news organizations**.** Additionally, counsel for the Named Plaintiffs answered questions consistent with the Delaware Rules of

Professional Conduct. This interview was not sought by Plaintiffs or their counsel, controlled by Plaintiffs or their counsel, nor disseminated by Plaintiffs or their counsel. Plaintiffs and their counsel had zero input as to editing of the material or means of distribution. Defendants have not identified any specific statement that is problematic or otherwise inconsistent with the Rules of Professional Conduct.

**2. The proposed gag order is unconstitutional.** The imposition of a gag order is a prior restraint on the individuals' First Amendment rights and should not be issued lightly. If a court limits any individual's First Amendment rights, the limitation "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). Therefore, a gag order is a disfavored remedy that carries "'a heavy presumption against its constitutional validity.'" *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971)).

Defendants disregard, wholly failing to acknowledge, the importance of public access to litigation; but "[t]he principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966) (quoting *In re Oliver*, 333 U.S. 257, 268 (1948); *see also* DE. R. Civ. P. 5(g)(1). The true intent

of Defendants is to litigate this matter, which involves issues of public import including health, safety and welfare, in secret.[1]

The Court must determine whether there is a "substantial likelihood of material prejudice." *See e.g., Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1037 (1991). This standard requires the party moving for a gag order to identify a "clear and present danger" to the litigation. *Id*. (quoting "*In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982). Nothing in the record demands a gag order's prior restraint, ***especially on parties, the public, third-parties, or the press***, when less restrictive alternatives exist. Therefore, Defendants necessarily fail to meet their burden to overcome the presumption of unconstitutionality.

The proposed order also creates an unconstitutionally vague restraint on First Amendment Rights. The proposed order bars "the attorneys, experts, consultants, and witnesses for both parties, [and ] the individual plaintiffs…" from making "any comments or issue any statements which attempt to sway the citizens of Delaware toward accepting their position in connection with this litigation." The language of the proposed order is unconstitutionally vague because there is no objective criteria which the targeted individuals could use to responsibly identify whether their speech was an attempt to "sway the citizens of Delaware." While

[1] Plaintiffs note they have recently filed a Motion to De-Designate Documents as Confidential because Defendants have caused blanket designations of confidentiality to be applied to all documents produced and even to all deposition testimony.

some language may be easily identifiable, other language will not. For example, counsel routinely participate in conferences and seminars on environmental matters that include litigation, but also broad social impact, including, specifically, the impact of large agricultural and dairy processing plants. Further, the term "consultant" in the proposed order is also unconstitutionally vague because it is unclear to whom it applies.[2]

This vagueness will cause a chilling of speech which the First Amendment prohibits. *Aiello v. City of Wilmington, Delaware*, 623 F.2d 845, 849 (3d Cir. 1980) (*Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1963); *see also Rode v. Dellarciprete*, 845 F.2d 1195, 1199 (3d Cir. 1988).

Given the context of the litigation and the type of speech in which the individuals engage, the proposed order is unconstitutionally vague and will chill speech protected by the First Amendment.[3]

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[2] For example, Maria Payan is identified as a "consultant" by Defendants. Plaintiffs' counsel is not aware of any financial, official, or unofficial agreement with any law firm in the instant case. Instead, she is a staff member of the Socially Responsible Agricultural Project ("SRAP"), a non-profit organization which "informs and educates the general public about the negative effects of concentrated animal feeding operations (CAFOs)—also known as factory farms—while working directly with U.S. communities impacted by this destructive form of industrial animal agriculture." *See https://sraproject.org/about/*.

[3] Since the Mountaire issue has been the subject of great public interest and may be an issue in the next election cycle, this makes the First Amendment right all the more important. (Ex. A). The fact this is such a great matter of public concern alone distinguishes this case from *Sokolove v. Marenberg* 2013 WL 6920602 (Del. Super. Dec. 20, 2013), which involved a private family dispute. The pressing issue before the Court was the unsealing of the Court record not a gag order.

**3. The gag order is unnecessary.** In seeking to limit freedom of speech, Defendants have offered no reason why such an order is necessary. The matter is not on the eve of trial; rather it remains months-to-years from the impaneling of a jury. Gag orders may be necessary when there is true concern that a jury pool will be prejudiced by statements but not when mere speculation as to publicity's impact may be known to a jury pool months or years from the date of the statement.

As to the requests to gag attorneys, Plaintiffs' attorneys already acknowledge they are bound by Prof. Cond. R. 3.6. Rule 3.6 further provides specific safe-harbors for attorneys to make statements based on the fact that publicity is a necessary part of some litigation. *See* Prof. Cond. R. 3.6(b). In response to the interviewer's questioning, counsel for the Named Plaintiffs plainly stayed within the safe harbor provisions of Rule 3.6(b). Defendants make no effort to identify a statement that is inconsistent with Rule 3.6. Instead, they seek a gag order because comment was made ***in accordance with the rules***. Similarly, no party or consultant violated any provision of Rule 3.6. A gag order is not necessary. The motion is a transparent attempt to stop speech that is permissible, to cause confusion, and to limit attorneys', Plaintiffs', the public's, and the press' speech by threat of sanctions.

**4. The gag order is unfair.** The proposed order is unfair on its face. The order is proposed to bind the 101 Named Plaintiffs but carves out an exception for

"defendants' employees." See Prop. Order, FN 1. Distinctly, the *Cupples* order applied to ***two*** individuals. If the Named Plaintiffs and their attorneys have to enforce this order upon 101individuals, then Defendants, with vast resources, should be responsible to ensure none of their employees, agents, independent contractors, consultants, or individuals with any relationship to the Defendants violate the proposed order as well.[4]

**Conclusion.** Because Defendants seek the imposition of an unconstitutional infringement on the First Amendment Rights of over one-hundred individuals, including the public, the press, private parties, and lawyers, and because the motion is both unnecessary and not equally balanced, Plaintiffs ask this Court to deny Defendants' motion. Because of the importance of this issue, if the Court is not inclined to summarily deny this Motion, Plaintiffs respectfully request that a briefing schedule be entered.

[4] The Order does not prevent Mountaire's current activities to convince the community it is a good corporate neighbor (Ex. B). Moreover, in *Monsanto Co. v. Aetna Cas. Sur. Co.*, 593 A.2d 1013 (Del. Super. 1990), Plaintiff's counsel was precluded from speaking with the employees, who under this Order can freely speak to the press.